APPELLANT'S REPLY BRIEF

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NO. 21999

OREN BELL,	)
	)
Appellant,	)
	)
v.	)
	)
UNITED STATES OF AMERICA,	)
	)
Appellee.	)
	)
UNITED STATES OF AMERICA,	)
	)
Appellant,	)
	)
v.	)
	)
OREN BELL,	)
	)
Appellee.	)

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

ROBERT A. PARRISH

536 Fourth Avenue
Fairbanks, Alaska 99701

Phone: 456-4070

Attorney for Appellant
Oren Bell

June, 1968.

APPELLANT'S REPLY BRIEF

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NO. 21999

OREN BELL,	)
	)
Appellant,	)
	)
v.	)
	)
UNITED STATES OF AMERICA,	)
	)
Appellee.	)
	)
UNITED STATES OF AMERICA,	)
	)
Appellant,	)
	)
v.	)
	)
OREN BELL,	)
	)
Appellee.	)

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

I N D E X

TABLE OF CASES CITED

OTHER AUTHORITIES CITED

APPELLANT'S REPLY BRIEF

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NO. 21999

OREN BELL,	)
	)
Appellant,	)
	)
v.	)
	)
UNITED STATES OF AMERICA,	)
	)
Appellee.	)
	)
UNITED STATES OF AMERICA,	)
	)
Appellant,	)
	)
v.	)
	)
OREN BELL,	)
	)
Appellee.	)

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

APPELLANT CONTESTS UNITED STATES'
STATEMENT OF FACTS.

The United States in its brief is inaccurate in that the statement of facts supplied by the United States violates the rules relating to the preparation of statements of fact.

1. The Appellee includes argument within the statement of fact. Example: page 7 at bottom, ". . . and I feel that a

fair interpretation of the evidence of all the doctors would support Dr. Parker's analysis." Example: page 7 middle, "This fact was also verified by Dr. J. Ray Langdon, the psychiatrist, who examined appellant on appellant's brief." Further examples appear at the bottom of page 5 and the top of page 6.

2. The Appellee misquotes the evidence of witnesses. Example: page 5, ". . . and that in fact he was injured to a mild extent but he had plenty of resources left (TR 468, line 21)" a true reading of the transcript at page 468:

> "A I did. There was a hooker in it. About the emotional stability. I do not believe that he has plenty of resources left. I believe I stated in my report that he needed help in this area, as much as it was possible to give him. I did think that his emotional capacity was intact and that there was a lot of that to use if he could use it.
>
> Q I misstated you, Doctor, your actual statement was, 'While he has been impaired to a mild extent by his injuries, at the same time there is plenty of capacity left provided he can deal with his emotions sufficiently well to allow it to develop.'
>
> A Yes sir." (TR 468)

What the doctor is trying to say here is that the plaintiff-Appellant must be able to use his emotional capacity which he cannot.

3. This brings us to the third objection to the statement of fact taken out of the context of the witness's testimony. Immediately following page 470, the above quoted statement, the doctor testified:

"A The tests reflect that there was some impairment of memory and there is a lack of controls, impulsivity, explosiveness and some bizarre ideation.

Q Would this degree be reflected actually in his actual ability to hold and retain employment and deal with other human beings?

A I previously testified that since employment is connected with interpersonal relationships, these tendencies might make difficulties for him in employment.

Q Would that actual degree be reflected in his history of employment and history of having been able to deal with persons in the community?

A I believe it would. Normally we consider that history is an important part of such evaluation.

(There were no further questions and the witness was then excused. Court was briefly in recess) (TR 469, 470)

Appellant's brief states that Dr. Parker stated whether the injuries would be permanent or not would be speculative (TR 445, line 21). The entire context of the doctor's statement is contained in the record, page 445 through 446, beginning with "It is my opinion that there will be some residual . . . Plus one other thing, Your Honor, also. It is a matter of training and clinical experience, that the brain, except for certain sorts of activities, does not repair itself." And further, on page 447, "Again this comes out of knowledge and clinical experience that many areas of the brain do not have the capacity for regeneration and when nerve cells are destroyed they do not replace themselves. Whatever function

is regained is in a large measure due to the finding of new pathways and the use of areas which were undamaged originally, but there are in all liklihood areas remaining which are filled with tissue which is non-functioning on a neuro basis. It is space filled with material and it's non-functioning."

4. With these objections in mind, we then proceed to the fourth objection which is that the testimony of experts is judged according to the validity of opinion based upon facts as a whole. The government cites page 438, line 22, as reading: "That his reasoning ability remained intact." The exact statement was, "His reasoning ability seemed to remain intact. This was in the area of intellectual performance. Therefore, I felt his intellectual performance had not been severely or probably even mildly impaired by what happened to him." Certainly, the government was misled by the doctor's statement. This failure to quote the entire thought of the witness is a statement out of context which does not convey the complete thought. The government cites transcript of record 442, line 11, as follows: "He was also of the opinion that many of the emotional tendencies which appellant demonstrated subsequent to the accident had pre-existed it." The witness in fact stated, "Yes sir, with the understanding that it is a hypothetical question. My reason for caution on this is, as I stated before, I had not examined or had no baseline of knowledge to proceed from with this young man. I deduced that some of the tendencies, particularly in the emotional area had pre-existed. However, it is the nature of the kind of organic brain damage which was evident from the medical records that controls would be loosened further, would be less available to him under emotional stress subsequent to

the trauma than previous to it."

Although without citation, Appellee insists that Dr. Langdon felt that therapy would definitely help Appellant's condition. We have not discovered such a statement attributable to Dr. Langdon.

APPLICABLE LAW

Rule 52 (b) announces the general rules that findings of fact will not be set aside on appeal unless clearly "erroneous."

But courts of appeal are not bound by Rule 52 (b) in all cases.

Where there is no contradiction of fact, the correct rule is set out in Fahs v. Taylor, 239 F.2d 224:

> "(1) We have repeatedly held that where there is no dispute as to the basic evidentiary facts, (and there is none here) and nothing remains but for the trial court to apply the process of reasoning to achieve a correct interpretation of the legal significance of evidentiary facts, as such conclusion of the trial court reaches an 'ultimate fact', is subject to review, not as we review a finding of fact, but freed from the restraint of the 'clearly erroneous' rule. The clearest statement of this principle is contained in Galena Oaks Corp. v. Schofield, 5th Cir., 218 F.2d 217, 219; it was reiterated in Goldberg v. C.I.R., 5th Cir., 228 F.2d 709 and most recently applied in Consolidated Naval Stores Co. v. Fahs, 5th Cir., 227 F.2d 923."

In 226 F.2d 330, Bullock v. Tamiami Trail Tours, Inc., Orris v. Higgins, 180 F.2d 657:

> "The court reviewing the entire evidence is left with the definite and firm conviction that a mistake has been committed."

Here the court felt the District Court had only to apply legal reasoning to facts.

Here the court set out testimony.

Where there was no credibility issue:

> ". . . absent credibility issue the reviewing court was in as good a position as the trial court to evaluate testimony, draw inference of which testimony was reasonably susceptible and decide critical issues raised and the 'clearly erroneous' rule was inapplicable to findings based solely on undisputed testimony contained in the deposition of witnesses whose credibility was unchallenged." Frazier v. Alabama Motor Club, Inc., 349 F.2d 456.

Where the court finds no substantial dispute and much evidence is undisputed, the court is Surasky v. U. S., 325 F.2d 191 held:

> "The facts are not in dispute since substantially all of the facts were either stipulated between the parties or proven by undisputed affidavit, or by deposition which was not in any way countered."

Likewise, upon review of the entire record, the reviewing court may find differently than the trial judge:

> "Even though there is evidence to support it the case may be reviewed if the reviewing court is left with the definite and firm conviction that a mistake has been committed reviewing the entire evidence."

> "Evidence sufficient to support a jury verdict may not be sufficient to support a trial judge."

> "Virtually irresistible inference drawn from undisputed facts. [emphasis ours] Orris v. Higgins, 180 F.2d 537.

In summary then, we see that the appellate courts have seen the way to correct those "conclusions" of the trial judge in those cases where the reviewing court can discern from the record, devoid of substantial dispute, that an error in the judgment has been made.

In this case we find that many undisputed affidavits were filed. (TR 356-7). Not only were these affidavits not disputed, but the record shows them to have been previously presented to the government. Counsel's affirmative statement appears in the record (TR 357-8) that the government was unable to dispute these affidavits. This presumes that the government investigated their truth.

The court should, therefore, review the entire record free from the "clearly erroneous" rule. The trial judge's findings are, however, "clearly erroneous."

HOW MUCH CAN THE APPELLANT PROVE?

By the presentation of witnesses, the Appellant established in undisputed fashion the normal state of affairs in Oren Bell's body and mind prior to trauma.

The undisputed evidence by Appellant established the pathology from which Oren Bell now suffers as being the result of injury to the brain stem. It is this neural injury which is the basis of the emotional imbalance which has resulted in Appellant's discharge from every job by every employer with whom he has sought to be employed. The system of cells located in the brain stem known as the reticular system were destroyed. The operation of these cells was normal and unaffected prior to trauma as shown by the normal state of affairs in this boy's body prior to trauma.

It is undisputed that the reticular system may be effected by trauma.

It is admitted that the onset and progress of Appellant's system is consistent with and parallels those cases wherein medical science recognizes a causal relationship to trauma. It is admitted that when brain cells are destroyed (organic destruction occurs), these cells do not regenerate and after two years results must be regarded as permanent.

This is all that the Appellant can prove.

THE ENTIRE RECORD IS NOT CUMULATIVE.

The Appellant respectfully refers to the entire record in support of his case.

The duty of reviewing the entire record is burdensome and cannot be encompassed in a brief.

The feeling and understanding of women, themselves mothers, who successfully reared families, is plain in their forthright consideration of this boy's problem. (Parker TR 317-322, and Moore TR 337-348)

There is no witness cumulative in this case. The observations here testified to relate themselves to the change which took place in Appellant as a whole person.

The government may then not object that Appellant's proof did not show enough of this boy's life to sustain the fourth step of Appellant's proof, to-wit: that the onset and progress of this condition parallels and is consistent with those cases in which medical science recognizes the relationship of trauma to the condition or disease.

Each day, each act; each impression is relevant. Brain injury is not suffered in the performance of a single

duty, or in a blinding flash of pain or discomfort. Instead it remains as a scar upon life through a gray and lonesome succession of days, months and years. Its effects traverse the whole spectrum of one's existence. It is felt day and night through the pity; the avoidance; and the reluctance of acceptance of those with whom he was formerly close.

In his over assurance, his lies, his representations that he is someone who he is not, does our Appellant know of his defect? Obviously not or he would not have allowed himself to change. No one can believe that there is a substitute for happiness. No one can believe that money in an adequate substitute. Oren Bell would trade all of the judgment ten times to be restored to himself and thank God for the bargain.

The evidence is not cumulative; instead it affords a full cross section of Oren Bell's pre-traumatic and post-traumatic life. This cross-section is essential to a medical determination that the onset and progress of this condition parallels and is consistent with those cases in which medical science recognizes the relationship of trauma to the condition or disease.

CORRECTION OF FINDINGS.

The court did not base the verdict upon the statement of fact cited by the government. First, because the statement by the government is not a correct statement; secondly, if that had been a correct statement of the evidence it would still have been erroneous in that it was out of context and contrary to the conclusions of those medical witnesses who testified.

The court chose not to make specific findings either as to loss of annual earning capacity (Patrick v. Sedwick, 413 P.2d 169) or reduction to present worth (Beaulieu v. Elliott, 434 P.2d 665, 671 [Alaska 1967]), or any finding at all as to the employability of Appellant.

Appellant requests the Appellate Court to instruct the trial court to enter a verdict in accordance with paragraph 13 of the findings of fact submitted by Appellant appearing on page 48 of Appellant's brief.

THE APPELLANT'S REQUESTED FINDINGS.

The Appellant should submit findings to assist the trial judge but there is no duty under Rule 52 (b) to ask the court to review findings where correct findings have already been submitted. The government cites no authority.

Under the clear weight of evidence here, we respectfully submit that the court had no choice between two permissive views as the government suggests.

The government points to no evidence sustaining the employability of Appellant. If Appellant is employable we respectfully inquire: AT WHAT? Certainly no one knows and we cannot speculate.

The entire record shows this Appellant would work if he could get a job.

Weight of evidence does not mean that the government can grasp a straw of evidence from a haystack of evidence and contend that the straw outweighs the remainder of the stock. It clearly does not do so.

The government offered no proposed findings of fact.

EMPLOYABILITY IS A PRACTICAL CONCEPT.

One is not required to be a vegetable to be unemployable.

Nor is one required to lose two eyes, two arms, or two legs to be unemployable.

The test is: Does the evidence by its greater weight show that there is any known occupation at which this young man is, to a reasonable probability, employable.

A. Dr. Taylor knows of none.

B. Dr. Mead knows of none.

C. None of Oren Bell's employers believe so. These employers are the real experts endowed by our system with the duty of total, final, judgments in these matters.

The established fact here is that this boy has not been able, though he has often tried, to hold a position of employment. He has been a loss to the Nation that he honorably served--he is no longer trusted in his community--he is without friends--he is shunted from pillar to post. We cannot escape these facts--We cannot avoid them by branding them as unsupported or speculative. There is in fact no known employment at which this young man will be able to function from now until the time that he shall be placed in his grave.

EMPLOY THE HANDICAPPED.

It is interesting to hear, on National television hookup, Mr. MacDonald Carey, a well-known screen star, speaking for the United States government, state: "Many of the handicapped are employable."

We agree: Oren Bell has been employed since his accident. He has been discharged from each and every job for reasons each assignable to his injury. He had worked from the time he was a child. He had never been discharged before.

But although many of the handicapped are employable, Oren Bell is not employable. He is not one of the many who are employable.

We have said before that the "proof is in the pudding." His employers have repeatedly disagreed with the conclusions of the trial judge.

It is the judge who is bound by the decision of the employers, not the employers who are bound by the decision of the judge. We must remember that the United States does not, by evidence, dispute the findings of the employers. Therefore, the court is bound by the uncontradicted evidence.

Respectfully, we argue that one who is injured through no fault of his own, through the fault of the United States, is entitled to damages commensurate with his productive power as it existed before trauma.

The fact of handicap is here fully admitted by Dr. Taylor.

The fact that employment has been attempted in good faith is admitted.

The fact of unemployability has, in fact, as well as theory been fully established. We cannot in deference to mistake and error or to punish Oren Bell for any reason, ignore the clear and beneficient purposes of the Federal Tort Claims Act which is fully applicable here.

Had we been dealing in an era, or at a time when the neural deficiencies and disability of the mind and substance of the brain were not fully explainable by competent evidence, our plea here might be questionable.

All we ask is that the law recognize the neural basis for human behavior as the same has been recognized by medicine, and that when that behavior is so altered, through the advent of trauma and fault of another, and a human being is made unemployable, that then this injury shall receive the same recognition in law as a handicap in the function of any other part of the human body.

The mere fact that an injury is not observable by x-ray does not mean that there is no injury.

On the contrary, Dr. Langdon did state, "We were never able to establish a therapeutic relationship even though he stated he wanted treatment . . ." On page 479, lines 11, 12 and 13, Dr. Langdon stated, "To the extent that there is any structural brain cell damage, there is nothing we can do about that."

APPELLANT'S POSITION IS SUPPORTED BY EVIDENCE.

The Appellee states: "Mere speculation that they (findings of fact) are in fact erroneous does not sustain this burden, nor does a lip service attack on the trial judge and the United States attorney sustain the burden, nor does the fact that Mr. Parrish feels that the judgment is inadequate sustain the burden."

The Appellant has seen fit to cite those principles of law which direct the Appellate Court's attention to the source of error.

The Appellant has never criticized the findings of the trial court so far as they go. The problem was and has been that these findings have never directed themselves to the true criteria of damages here.

This Appellate Court will remember that there are, in TORT cases two diametrically opposed philosophies which militate against each other. On one hand the plaintiff pleads in these cases that his personal security be restored in damages. On the other, the defendant seeks to guard his property from invasion by the claim of the plaintiff.

It must be recognized that individuals, be they attorneys or judges, may, by reason of background or legal environment or nature, be either unable or unwilling to recognize the effect of evidence in an individual case, for fear that, in the decision, or advocacy, a trend might be created which would encourage an onslaught against the citadel in which their mind resides.

It was, therefore, in recognition of these unspoken sources of injustice that Justice Frankfurter spoke when he cautioned the judges of United States courts that courts had no duty as guardians of the treasury of the United States (Indian Towing Co. v. U. S., 76 S.Ct. 122).

The Appellant must then respectfully submit to the Appellee United States of America that this case is submitted to the Appellate Court as one of those cases wherein the trial court was correct insofar as it went but did not give effect to the combined evidence and diagnosis of the total injury which occurred here, particularly the injury in the emotional controls of the human being which in their neural

basis are centered in the reticular system of the human brain stem.

THE APPELLANT'S MEDICAL CASE IS SUPPORTED BY MEDICAL FACT.

Reference is made in the government's brief to medical speculation. Nothing could be further from the facts. This case is supported by the contemporary knowledge of medical science which acknowledges the existence of the neural basis of Appellant's irrational conduct as being related to injury to the reticular forman of the brain stem.

This medical fact, undisputed here, was not manufactured through speculation of this counsel for purpose of fraudulently obtaining money from the United States. It was discovered through the efforts of medical science in its quest to eliminate human suffering.

The horribly sad and terrifying fact is, that a normal, productive, ambitious, gregarious, trustworthy young man, living in dignity, was changed, through injury to his brain stem, into a nonproductive, lonesome, frustrated, argumentative, untrustworthy individual living alone and without dignity.

In the contemporary sophistication of modern medical science we have become aware that "There is a neural basis for all human behavior." (The Neural Basis of Human Behavior, Harold Saxton Burr, Ph.D., Charles C. Thomas, Publisher, Springfield, Illinois) A human being who suffers hallucinations will not be burned as a witch. It is common knowledge that such conditions may exist or be precipitated with or without the advent of trauma.

The exact issue of fact to be determined in this case is whether or not the emotional controls of Oren Bell are so affected by this trauma that he is not employable. (This in addition to other partial conditions). This issue of fact has never been faced by the trial judge nor the government in its brief.

We must allow recovery to an injured person upon the basis of abnormality produced by the accident. He does not claim error for failure of the trial judge to recognize other injuries not producing such disability. But the government and the trial judge do not pretend to recognize the real issue in this case.

The pathology from which plaintiff suffers has made him unemployable.

> "Q As I understand from Dr. Parker, the psychologist, and perhaps from Dr. Langdon, at least from Dr. Parker, he has an intelligence range in the bright-normal range?
>
> A Yes sir.
>
> Q But apparently in this emotional and behavioral field he is abnormal. Now why is that, assuming that an average intelligent person, a normal person, we all realize we can't argue with everyone, we have to do things we don't like to do and we have to get along with our fellow workers. Is there something that has happened to this person as a result of the accident and injury that this individual cannot rationalize and accept and understand that fact and do anything about it? (emphasis ours)
>
> A That appears to be the case, yes." (TR 553)

CONCLUSION.

The court is bound by expert medical knowledge in those areas of the case which require the production of expert medical testimony.

The general rule is that the Appellant, to sustain the burden of proof in respect to the medical aspects of his case, must produce medical evidence to do so.

But a corollary to the rule is that the finders of fact may not ignore the uncontradicted medical evidence.

All medical evidence points to severe organic impairment--anxiety--paranoia--frustration--personality change--headache--poor judgment--lack of control--poor physical coordination--memory defects.

The trial judge was bound to accept these residuals of the trauma.

That these and others have resulted in unemployability is proven. (Wilson v. Interior Airways, Inc., 384 P.2d 956).

SUMMARY.

In this reply brief we are calling attention to the matter of employability as it has been raised in the government's brief which has been connected with the principle central nervous system difficulties encompassing impulsivity, emotion, liability and lack of emotional control. We must not forget that other cumulative factors pointed out in Appellant's original brief which include both coordination, poor balance, headaches and other specific memory and mental difficulties, all cumulate in addition to those things specifically discussed here in the reply brief.

Dated at Fairbanks, Alaska, this _____ day of _____, 1968.

Respectfully submitted,

ROBERT A. PARRISH
536 Fourth Avenue
Fairbanks, Alaska 99701

Attorney for Appellant

_____

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

_____

Robert A. Parrish